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No. 04-819

In The

Supreme Court of the United States

SWIFT-ECKRICH, INC., DOING BUSINESS AS CONAGRA REFRIGERATED FOODS,

Cross-Petitioner,

v.

UNITHERM FOOD SYSTEMS, INC.,

Cross-Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

ROBERT A. SCHROEDER
Counsel of Record
LEIGH OTSUKA LINDER
BINGHAM MCCUTCHEN LLP
355 South Grand Avenue,
Suite 4400
Los Angeles, California 90071
(213) 680-6400

JOHN P. PASSARELLI
DAVID H. ROE
MCGRATH NORTH MULLIN
& KRATZ PC LLO
3700 First National Tower
1601 Dodge Street
Omaha, Nebraska 68102
(402) 341-3070

Attorneys for Cross-Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Should appellate review of antitrust standing be based on allegations in the pleadings instead of the evidence at trial?

2. Is a party moving to dismiss for lack of antitrust standing obligated to comply with the requirements of Rule 50 of the Federal Rules of Civil Procedure to preserve its rights on appeal?

3. If Rule 50 does apply, is it necessary, to fully preserve the moving party's rights on appeal, to renew, post-verdict under Rule 50(b), a pre-verdict motion under Rule 50(a)?

PARTIES TO THE PROCEEDING

Cross-Petitioner herein, and Appellant-Defendant below, is Swift-Eckrich, Inc., doing business as ConAgra Refrigerated Foods ("ConAgra"). Cross-Respondent herein, and Appellee-Plaintiff below, is Unitherm Food Systems, Inc. ("Unitherm"). An additional plaintiff in the case before the United States District Court for the Western District of Oklahoma is Jennie-O Foods, Inc.

RULE 29.6 STATEMENT

ConAgra's parent company is ConAgra Foods, Inc., which is a publicly traded company that owns more than 10% of ConAgra's stock.

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CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion of the United States Court of Appeals for the Federal Circuit is reported at 375 F.3d 1341. (Appendix A to Petition of Unitherm ["App. A"], 1a-54a.)

JURISDICTION

The Federal Circuit's opinion and order was entered on July 12, 2004. Timely Petitions for Panel Rehearing and Rehearing En Banc were denied on September 14, 2004 (Appendix B to Petition of Unitherm, 55a-56a.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). This Conditional Cross-Petition is filed pursuant to United Supreme Court Rule 13.4 in connection with a petition for writ of certiorari filed by Unitherm with a date of docketing of November 4, 2004.

STATUTES INVOLVED

This Cross-Petition involves Rule 50 of the Federal Rules of Civil Procedure. (Appendix C to Petition of Unitherm, 57a-60a.)

STATEMENT OF THE CASE

The Federal Circuit Court of Appeals correctly determined that Unitherm, the plaintiff below, had not introduced the necessary evidence of standing, particularly antitrust injury, but then it inexplicably ignored its own

review of the evidence and looked to the ***pleadings*** alone to support a conclusion that standing had, in fact, been established after all. Instead of dismissing the antitrust count, the Federal Circuit then turned to a procedural question that should never have been reached: whether the issue of sufficiency of the evidence to sustain a jury verdict had been preserved for purposes of appeal under Rule 50. Applying Tenth Circuit law, the Federal Circuit held that, although there had been a proper pre-verdict motion under Rule 50(a), the absence of a post-verdict motion under Rule 50(b) precluded a reversal. The antitrust claim was, therefore, remanded.

Since standing is a matter of law and cannot be waived, Unitherm's antitrust count should have been dismissed once the court concluded that the evidence did not support standing. Contrary to the views expressed by the Federal Circuit, the procedural requirements of Rule 50 – which apply to a determination of whether there was sufficient evidence to support a jury verdict – were not implicated. Standing was never a jury question to begin with. Thus, no Rule 50 motions, pre- or post-verdict, were needed to preserve the full range of options available to ConAgra on appeal.

Even if this Court should conclude that Rule 50 does apply to the issue of antitrust standing, the rule has been applied incorrectly. A pre-verdict motion under Rule 50(a) fully preserves the moving party's rights on appeal. A post-verdict renewal of the Rule 50(a) motion under Rule 50(b) is ***permissive***. The Federal Circuit, therefore, should have reversed, not remanded, based on ConAgra's pre-verdict Rule 50(a) motion.

REASONS FOR GRANTING THE WRIT

I. THE FEDERAL CIRCUIT SHOULD NOT HAVE VACATED THE JUDGMENT AND REMANDED AFTER FINDING THAT THE EVIDENCE WOULD NOT SUPPORT ANTITRUST STANDING.

Unitherm, a manufacturer of food processing equipment, sued ConAgra, a food processor, alleging violation of Section 2 of the Sherman Act. Unitherm's theory was that ConAgra had obtained a patent by fraud and then attempted to monopolize an alleged relevant market that was coterminous with the food browning process claimed in the patent. ConAgra argued, *inter alia*, that Unitherm had not suffered any antitrust injury, and hence, lacked antitrust standing. (App. A, 42a.) The jury reached a verdict in Unitherm's favor on the Sherman Act count. ConAgra did not renew its motion to dismiss in a ***post-verdict*** motion for JMOL under Rule 50(b).

There is no room for doubt that Unitherm failed to prove antitrust standing. The jury was instructed that Unitherm "asserts the relevant market consists of the browning process defined in the '027 patent," and Unitherm made no objection to this instruction. (App. A, 10a.) Unitherm admitted, however, that there had never been a transaction in this process market, or in the broader market for browning processes generally. (App. A, 48a.) Moreover, there was no competition whatsoever between Unitherm and ConAgra. (App. A, 47a-48a.) Unitherm sold food processing equipment, while ConAgra sold food products. (App. A, 3a, 4a.)

The entire basis for Unitherm's Sherman Act claim was that letters written by ConAgra offered a license under a fraudulently obtained patent to its competitors

(other sellers of food products). The evidence was uncontroverted that no one expressed an interest in a license, much less accepted a license, and no competitor of ConAgra testified that it refrained from using the patented process because of ConAgra's conduct. (App. A, 48a.) No one testified that sales of any food products, whether or not browned by the patented process, were lost as a result of ConAgra's conduct. (*See*, App. A, 50a.)

In addition to finding for Unitherm on the antitrust count, the jury found for Unitherm on the state law count for interference with prospective economic advantage. Actual damages based on this claim were assessed at $2,000,000, to which an equal amount of punitive damages was added. The Federal Circuit let this award stand. Thus, Unitherm was generously compensated for any harm to it, and ConAgra does not contest that award. It is only the antitrust count that is the subject of this Cross-Petition.

Unitherm's lack of antitrust standing was raised in ConAgra's appeal to the Federal Circuit, which had jurisdiction over the appeal pursuant to 28 U.S.C. § 1295(a). The Federal Circuit said:

> ConAgra appeals the jury's antitrust verdict, claiming that Unitherm did not produce evidence sufficient to support findings of a relevant antitrust market, a dangerous probability of success, ***antitrust injury, or standing*** – all critical elements of a § 2 attempted monopolization claim. *See generally Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP,* 54 U.S. 398, 124 S.Ct. 872 (2004).

(App. A, 27a, emphasis added.)

The Federal Circuit began its analysis by correctly noting that, under Tenth Circuit law, antitrust standing is a question of law subject to *de novo* review that requires review of the evidence supporting its factual elements.[1] (App. A, 13a.) The Federal Circuit acknowledged that "antitrust injury" was an essential element of "antitrust standing:"

> For Unitherm to possess antitrust standing under Tenth Circuit law, it must demonstrate that ConAgra's behavior caused it to suffer an "antitrust injury." *Ashley Creek Phosphate Co. v. Chevron USA, Inc.*, 315 F.3d 1245, 1252 (10th Cir. 2003).

(App. A, 43a.) After reviewing the evidence in the record, the Federal Circuit concluded:

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[1] The court said:

> The Tenth Circuit recognizes antitrust standing, like all questions of standing to sue, as a question of law subject to de novo review. *Ashley Creek Phosphate Co. v. Chevron USA, Inc.*, 315 F.3d 1245, 1253-1254 (10th Cir. 2003); *Motive Parts Warehouse v. Facet Enters.*, 774 F.2d 380, 389 (10th Cir. 1985). Market definition and antitrust injury, on the other hand, are intensely factual determinations. *See e.g., Eastman Kodak Co. v. Image Technical Servs.*, 504 U.S. 451, 482 (1992) ("The proper market definition in this case can be determined only after a factual inquiry into the 'commercial realities' faced by consumers."); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585-586 (1986) ("To survive petitioners' motion for summary judgment, respondents must establish that there is a genuine issue of material fact as to whether petitioners entered into an illegal conspiracy that caused respondents to suffer a cognizable injury."). ***We must therefore review the evidence supporting the jury's necessary findings of a relevant antitrust market and of antitrust injury.***

(App. A, 13a-14a, emphasis added.)

> In short, Unitherm failed to present any economic evidence capable of sustaining its asserted relevant antitrust market, and little else to support any other aspect of its Section 2 claim.

(App. A, 50a.)

> In particular, Unitherm failed to present any facts that could allow a reasonable jury to accept either its proposed market definition or ***its demonstration of antitrust injury***.

(App. A, 44a, emphasis added.)

Notwithstanding its recognition of Unitherm's failure to prove antitrust injury, an essential element of antitrust standing, the Federal Circuit nevertheless found that Unitherm ***did*** have antitrust standing. It erroneously reached this conclusion by looking not to the evidence but the ***pleadings***: "Unitherm's ***allegations***" met the applicable standard for determining antitrust standing.[2] Thus, the Federal Circuit did not apply a *de novo* standard to a review of the ***evidence*** of antitrust standing as it had

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[2] In the case below, the Federal Circuit said:

> Unitherm's ***allegations*** met all six of the Tenth Circuit's enumerated factors: (1) ConAgra's attempts to block the "Unitherm process" by enforcing the '027 Patent caused Unitherm to lose prospective sales; (2) ConAgra's fraud of the PTO demonstrated improper intent; (3) Antitrust laws provide remedies for competition reduced in a relevant antitrust market, which Unitherm pled; (4) Enforcement of a patent right directly reduces competition; (5) A lost-sales analysis could, in theory, measure the harm; and (6) Damage calculations should be neither unusually complex nor duplicative. The district court was therefore correct in ruling that Unitherm had antitrust standing and in allowing its action against ConAgra to proceed.

(App. A, 44a, emphasis added.)

earlier concluded it must do. (App. A, 13a-14a, 44a.) Instead, the Federal Circuit applied a "sufficiency of the evidence" standard, found that the evidence supporting antitrust liability was insufficient, and remanded the action for a new trial. (App. A, 50a-51a, n.7.)

2. THE FEDERAL COURT HAS IMPROPERLY DEPARTED FROM THE *DE NOVO* STANDARD OF REVIEW OF THE EVIDENCE.

Standing to sue is a necessary element of the subject matter jurisdiction of federal courts. *Steel Co. v. Citizens for a Better Env.*, 523 U.S. 83, 101 (1998) (suit brought by a plaintiff without Article III standing is not a "case or controversy," and an Article III federal court therefore lacks subject matter jurisdiction over the suit). The evidence necessary to establish an Article III "case or controversy" must, at a minimum, prove the following elements: (1) an injury in fact; (2) a causal relationship between the injury and the challenged conduct; and (3) a likelihood that the injury can be redressed by a favorable ruling. *United States v. Hays,* 515 U.S. 737, 742 (1995); *Northeastern Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville,* 508 U.S. 656, 663-665 (1993).

Where the plaintiff seeks redress under the federal antitrust statutes, its showing of standing also must include proof of an "injury causally linked" to conduct that violates the antitrust laws, that is, "'plaintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful.'" *Cargill, Inc. v. Monfort of Colorado, Inc.,* 479 U.S. 104, 109 (1986) (emphasis in original) (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.,* 429 U.S. 477, 489 (1976)).

> An antitrust injury is defined as an injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. . . . Factors to consider in evaluating antitrust standing include: (1) the causal connection between the alleged antitrust violation and the harm; (2) improper motive or intent of defendants; (3) whether the claimed injury is one sought to be redressed by antitrust damages; (4) the directness between the injury and the market restraint resulting from the alleged violation; (5) the speculative nature of the damages claimed; and (6) the risk of duplicative recoveries or complex damage apportionment.

Sports Racing Servs. v. Sports Car Club of Am., 131 F.3d 874, 882 (10th Cir. 1997) (internal citations and quotations omitted); *Indium Corp. of Am. v. Semi-Alloys, Inc.*, 781 F.2d 879, 882 (Fed. Cir. 1985); *see generally Associated Gen. Contractors v. California State Council of Carpenters*, 459 U.S. 519, 534-45 (1983). This requirement of "antitrust injury" exists because "'the antitrust laws . . . were enacted for the protection of *competition*, not *competitors*.'" *Cargill*, 479 U.S. at 110 (quoting *Brunswick*, 429 U.S. at 488 [quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962) (emphasis in original)]). "Harm to the antitrust plaintiff is sufficient to satisfy the constitutional requirement of injury in fact, but the court must make a further determination whether the plaintiff is a ***proper party*** to bring a private antitrust case." 15 James Wm. Moore et al., Moore's Federal Practice, § 101.61, 101-22 (3d ed. 2004) (emphasis added) (citing *Associated Gen. Contractors*, 459 U.S. at 535, n.31).

By basing its conclusion that antitrust standing had been established on ***allegations*** instead of ***evidence***, the

Federal Circuit proceeded in a manner that cannot be reconciled with these precedents.

3. THE FEDERAL CIRCUIT HAS IMPROPERLY APPLIED RULE 50 TO ITS DETERMINATION OF STANDING.

Not every question that involves a review of the evidence is subject to the standards that apply to jury determinations under Rule 50(a). The federal courts have broad power to weigh evidence and resolve factual issues to determine whether plaintiffs have carried their burden of proving standing and other aspects of jurisdiction.[3] The Federal Circuit's decision below, however, rejected this basic principle announced in many of this Court's precedents and declined to act based on its own review of the

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[3] For example, the First Circuit has stated:

> In a situation where the parties dispute the predicate facts allegedly giving rise to the court's jurisdiction, the district court will often need to engage in some preliminary fact-finding. In that situation, the district court "enjoys broad authority to order discovery, consider extrinsic evidence, and hold evidentiary hearings in order to determine its own jurisdiction." In such a case, the district court's findings of fact will be set aside only if clearly erroneous. The court's ultimate conclusion regarding the existence vel non of subject matter jurisdiction is a question of law subject to de novo review.

Skwira v. United States, 344 F.3d 64, 72-73 (1st Cir. 2003) (internal citations omitted), *cert. denied*, 124 S.Ct. 2836 (2004); *Mortensen v. First Fed. Sav. and Loan Ass'n*, 549 F.2d 884, 891 (3rd Cir. 1977), *cert. denied*, 454 U.S. 897 (1981) ("the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case"); *MDPhysicians & Assoc., Inc. v. State Bd. of Ins.*, 957 F.2d 178, 181 (5th Cir.), *cert. denied*, 506 U.S. 861 (1992) (affirming dismissal for lack of subject matter jurisdiction based on the complaint, supplemented by undisputed facts and the court's resolution of disputed facts).

evidence. Remand for a re-trial before a jury of any issues related to the antitrust count was improper because Unitherm did not in the first trial establish a right to have the case submitted to the jury.

Long-standing precedents of this Court and the Circuit Courts of Appeals are inconsistent with the notion that the standards and procedures of Rule 50 generally applicable to a motion for JMOL should be applied to plaintiff's evidence of antitrust standing. We recognize that standing, like other jurisdictional issues, can be, and often is, raised as part of a Rule 50(a) motion at the close of the evidence or as part of a Rule 50(b) motion after the verdict. This is, however, merely a matter of convenience, not a requirement. Thus, in *Neely v. Martin K. Eby Constr. Co.*, 386 U.S. 317, 327 (1967), this Court recognized the important difference between a motion for JMOL based on sufficiency of the evidence, on the one hand, and jurisdictional matters, on the other. Justice White, writing for the majority, reasoned that questions such as improper jury instructions or erroneously excluded evidence,

> are issues of law with which the courts of appeals regularly and characteristically must deal. The district court in all likelihood has already ruled on these questions in the course of the trial and, in any event, has no special advantage or competence in dealing with them. They are precisely the kind of issues that the losing defendant below may bring to the court of appeals without ever moving for a new trial in the district court.

Id. (citing *Globe Liquor Co. v. San Roman*, 332 U.S. 571, 574 (1948)). Justice White acknowledged that district courts have "no special advantage or competence" in dealing with questions of law reserved exclusively for the

court, and the defendant may raise such questions of law on appeal without having ever having raised those issues post-verdict. *Id.*

Although a determination of standing requires a court to review the evidence,[4] it is ultimately a question of law.[5] For this reason, standing can be, and often is, evaluated on motions for summary judgment.[6] The standing inquiry is thus analogous to other issues on which the ***court*** is the fact-finder, with the jury, if there is one, acting only in an advisory capacity. In these cases, Rule 50 has been held to be inapplicable.[7]

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[4] 15 James Wm. Moore et al., *supra*, § 101.30[1] ("reviewing a grant of summary judgment, the court need not accept the plaintiffs' alleged chain of events if they are unable to demonstrate ***competent evidence to support each link***," emphasis added).

[5] *See, e.g., Steir v. Girl Scouts of the USA*, 383 F.3d 7, 15 (1st Cir. 2004); *Fund for Animals v. Babbitt*, 89 F.3d 128, 132 (2d Cir. 1996); *United States v. Contents of Accounts Nos. 3034504504 and 144-07143*, 971 F.2d 974 (3d Cir. 1992), *cert. denied*, 507 U.S. 985 (1993); *Shaw v. Hunt*, 154 F.3d 161, 164 (4th Cir. 1998); *Pederson v. Louisiana State Univ.*, 213 F.3d 858 (5th Cir. 2000); *Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565, 573 (6th Cir. 2004); *United States v. 5 S 351 Tuthill Road*, 233 F.3d 1017, 1020 (7th Cir. 2000); *Park v. Forest Serv. of the United States*, 205 F.3d 1034, 1036 (8th Cir. 2000); *R.C. Dick Geothermal Corp. v. Thermogenics, Inc.*, 890 F.2d 139, 145 (9th Cir. 1989) (en banc); *Ashley Creek Phosphate Co. v. Chevron USA, Inc.*, 315 F.3d at 1253-1254 (Tenth Circuit opinion); *United States v. 5000 Palmetto Drive*, 928 F.2d 373, 375 (11th Cir. 1991); *Rite-Hite Corp. v. Kelley Co., Inc.*, 56 F.3d 1538, 1551 (Fed.Cir.) (en banc), *cert. denied*, 516 U.S. 867 (1995).

[6] *See, e.g., Bodie-Rickett and Assoc. v. Mars, Inc.*, 957 F.2d 287, 290-291 (6th Cir. 1992) (summary judgment granted for lack of antitrust standing); *Ashley Creek Phosphate Co. v. Chevron USA, Inc.*, 315 F.3d at 1261 (same).

[7] *See* 9 James Wm. Moore et al., *supra* § 50.05[1] (courts have interpreted Rule 50(a) to mean that "motions for judgment as a matter of law are available only in civil cases tried by a jury with the power to

(Continued on following page)

This Court has reversed where evidence of antitrust injury was lacking, even in a case in which standing was ***not*** raised by any post-trial motion under Rule 50. In *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, *supra*, a post-trial motion under Rule 50 had been made, but the plaintiff's standing under the antitrust laws was not challenged. Nevertheless, this Court, upon reviewing the plaintiff's evidence of its damages (profits plaintiff would have earned in the absence of a merger assertedly violating the antitrust laws), concluded that no antitrust injury had been shown and vacated the judgment of the Court of Appeals. *Id.* at 490. Similarly, in *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, *supra*, no post-trial motion had been made challenging the plaintiff's antitrust standing. This Court, however, examined the evidence offered by the plaintiff in support of two damages theories (the threat of lost profits stemming from the possibility that the merged firm would lower prices, and the threat of being driven out of business by prices below cost). This Court held: "[t]he record below does not support a finding of antitrust injury, but only of threatened loss from increased competition." *Id.* at 122. Judgment for the plaintiff was reversed, and the case was remanded for further proceedings consistent with the opinion. *Id.*

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return a binding verdict") and cases cited therein; *Ortloff v. United States*, 335 F.3d 652, 660 (7th Cir. 2003) (motion under Rule 50(a) is appropriate only in a jury trial, not a bench trial); *Geddes v. Northwest Mo. State Univ.*, 49 F.3d 426, 429, n.7 (8th Cir. 1995) (Rule 50 does not apply in case in which district court acted as finder of fact); *Schlitt v. Florida*, 749 F.2d 1482, 1483 (11th Cir. 1985) (Rule 50 does not apply to cases tried before a court with an advisory jury).

More importantly, any argument that a motion for JMOL under Rule 50 is prerequisite to appellate review of the sufficiency of the evidence of standing would contravene the doctrine that the federal courts have broad power to determine their own subject matter jurisdiction. *See e.g., U.S. Catholic Conf. v. Abortion Rights Mobiliz., Inc.*, 487 U.S. 72, 72 (1988) (district courts have "inherent and legitimate authority . . . to issue . . . binding orders . . . as necessary for the court to determine and rule upon its own jurisdiction, including jurisdiction over the subject matter"). It is because standing is critical to the issue of subject matter jurisdiction that the absence of standing can be asserted for the first time on appeal.[8] Indeed, if the defect is never raised by the defendant, it can still be raised *sua sponte* by the reviewing court.[9]

The Federal Circuit decision below has set a very dangerous and unwise precedent. It radically changes the law by dispensing with *de novo* review and permits federal jurisdiction to be based on mere allegations of a complaint.

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[8] *See NOW v. Scheidler*, 510 U.S. 249, 254-255, *reh'g denied*, 114 S.Ct. 1340 (1994); *FW/PBS v. City of Dallas*, 493 U.S. 215, 229, 232 (1990) (raised sua sponte), *overruled on other grounds by* 124 S.Ct. 2219 (2004).

[9] *See United States v. Hays*, 515 U.S. 737, 742 (1995) (noting that "[t]he question of standing is not subject to waiver. . . . The federal courts are under an independent obligation to examine their own jurisdiction, and standing is perhaps the most important of [the jurisdictional] doctrines.") (quoting *FW/PBS, Inc. v. Dallas*, 493 U.S. at 230-31) (internal quotation marks omitted).

4. A MOTION UNDER RULE 50(b) IS NOT REQUIRED TO FULLY PRESERVE RIGHTS TO APPEAL IF A MOTION UNDER RULE 50(a) HAS BEEN MADE.

If this Court chooses to apply Rule 50(b), that rule should be interpreted in a manner that is not advanced by Unitherm, the Federal Circuit, or the Tenth Circuit. Rule 50(b) ***does not require*** a motion after the verdict to preserve the full range of rights on appeal when a pre-verdict motion has been made under Rule 50(a).

Rule 50(b) is relatively short, easily understood, and, like all Federal Rules of Civil Procedure, should be given its "plain meaning." *Business Guides, Inc. v. Chromatic Comms. Enters., Inc.*, 498 U.S. 533, 540 (1991). The rule provides that if a motion were made for judgment as a matter of law under Rule 50(a) before submission of the case to the jury, the movant "may" renew its motion "no later than 10 days after entry of judgment." It does not say that a party who chooses not to "renew" such a motion after the verdict thereby loses the right to appeal the denial of the Rule 50(a) motion.

Many motions can be, and are, renewed, i.e., the trial court is explicitly asked to consider the motion again. However, the fact that a motion is ***not*** renewed when the opportunity arises does not mean that the original motion can no longer serve as the basis for an appeal. Rule 50(b) offers no reason to suppose that a Rule 50(a) motion is to be treated differently from other motions in this respect. Rule 50(b) is permissive, not ritualistic; it simply provides a time period for the written renewal of a Rule 50(a) motion when the moving party desires to renew and argue the point again. We should not assume, however, that the moving party did not mean what it said the first time just

because it did not make the same motion again. In this case, ConAgra did move, under Rule 50(a), for dismissal of the antitrust claim at the close of the evidence and was not required to make that motion again under Rule 50(b) to preserve its right to appeal.

Unitherm may argue the 10-day limit on Rule 50(b) motions under Rule 50(b) somehow implies a loss of the right to appeal once that period has run. It does not. There must be a limit to the time for renewal of Rule 50(a) motions, after which the district court can enter judgment making the case ripe for appeal, but that does not imply that a properly made Rule 50(a) motion is nullified if it is not made again under Rule 50(b).

An argument has been advanced that a post-verdict Rule 50(b) motion is not only desirable, but, indeed, so desirable that a judge-made rule requiring such a motion should be grafted on to the otherwise explicit provisions of Rule 50(b). The theory is that the trial judge will inevitably benefit from this post-trial written presentation of the motion and the case will thus be better postured for appellate review. *See, e.g., Biodex Corp. v. Loredan Biomedical, Inc.*, 946 F.2d 850, 859 (Fed. Cir. 1991) (citing *Railroad Dynamics, Inc. v. A. Stucki Co.*, 727 F.2d 1506, 1513 (Fed. Cir.), *cert. denied*, 496 U.S. 871 (1984)). The flaw in this argument is that such a "one size fits all" approach is both unnecessary and wasteful. Trial judges regularly instruct counsel that they do or do not want motions briefed, and this includes motions that may result in an appeal.[10] Indeed, when trial judges believe that briefs

[10] *IBM v. Edelstein*, 526 F.2d 37, 47 (2d Cir. 1975) (oral motions "are not only contemplated but, absent unusual circumstances,

(Continued on following page)

would be helpful, they have shown no hesitation to order that briefs should be filed, when such briefs should be filed, how long the briefs should be, what kind of paper the briefs should be printed on and what typeface should be used. *See, e.g.*, W.D. Okla. LCvR7.2(c) (length and format of briefs). If the trial judge does not get exactly what he or she wants, the motion can be, and sometimes is, denied on that basis alone. Fed.R.Civ.P. 83(a)(2) (willful failure to comply with local rules of form); Fed.R.Civ.P. 83(b); 14 James Wm. Moore et al., *supra*, § 83.31. There is no reason why trial judges cannot follow this practice when they believe that briefing of a Rule 50(a) motion that has been taken under submission might be beneficial. Moreover, the mere filing of written briefs is hardly a guarantee that the trial judge will explain his or her views of the matter more clearly than set forth earlier in the case.

This case illustrates the point perfectly. The issue of antitrust standing, including antitrust injury, was the subject of a fully-briefed motion for summary judgment as to both plaintiffs, Unitherm and Jennie-O (not a party to the appeal). The motion was granted as to Jennie-O, but denied as to Unitherm, and the reasoning of the District Court was set forth in a written opinion. (App. A, 9a.) The point was briefed again in ConAgra's pre-trial memoranda. During trial, the trial judge several times expressed her desire not to hear further about ConAgra's position on the deficiencies of the antitrust claim. That issue had been explored, the trial judge had made up her mind and explained her views, and ConAgra could appeal if it

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virtually mandated by Federal Rule 7(b)(1)."); *see also* Robert L. Haig et al., Business and Commercial Litigation in Federal Courts § 24.5(b).

wanted. Nothing more was needed or even helpful for proper appellate review.

In essence, Unitherm's argument is that for ConAgra to have preserved its right to appeal, it was required to engage in an empty formality: ConAgra had to make its motion to dismiss the antitrust claim twice. It had to explain for a second, third or fourth time why Unitherm, which is not a competitor of ConAgra in any market, lacked antitrust standing. Perhaps there would be some logic in requiring ConAgra to uselessly repeat its motion if such a requirement could be found in the Federal Rules of Civil Procedure, but it cannot be found in Rule 50(b) or anywhere else.

Rule 1 is in point. It provides that "these rules govern the procedures in the United States district courts . . . ," a statement that leads one to believe that once the Federal Rules have been fully complied with in both letter and in spirit, there are no remaining procedural obstacles to achieving basic justice, including appellate review. Rule 1 further says that the Rules "shall be construed and administered to secure the just speedy, and inexpensive determination of every action," a statement that is hardly reconcilable with the imposition of unneeded procedural barriers to appeal that are nowhere set forth in the Rules.

Rule 7 also bears on this point, providing that "[a]n application to the court for an order shall be by motion which, ***unless made during a hearing or trial***, shall be made in writing, shall state with particularity the grounds therefore, and shall set forth the relief or order sought." (Emphasis added.) Since the motion *sub judice* was made during trial under Rule 50(a), it was fully effective under Rule 7 and thus preserved all of ConAgra's appellate

rights. If the trial court wanted written briefs on ConAgra's Rule 50(a) motion, it could have so ordered.

Even the older cases on which Unitherm relies held that a renewal of a pre-verdict motion was **not** required to preserve the right to a re-trial, only to preserve the right to a reversal.[11] It is time to revisit the question and hold that motions under the current Rule 50(b) are permissive and are not necessary to preserve rights of any kind on appeal.

CONCLUSION

Unitherm's antitrust claim should be dismissed for lack of antitrust standing. Alternatively, that claim should be dismissed because ConAgra's motion under Rule 50(a) for judgment as a matter of law should have been granted, the absence of a Rule 50(b) motion not being a bar to appellate review of a Rule 50(a) motion. Judgment for Unitherm should be entered, but based only on its Oklahoma state law

[11] This Court has, to be sure, visited this issue a half century ago, albeit when Rule 50 took a different form. *Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212 (1947); *Globe Liquor Co., Inc. v. San Roman*, 332 U.S. 571; *Johnson v. New York, N.H. & H.R. Co.*, 344 U.S. 48 (1952). The Court took the position that, where substantial evidence did not support a judgment, but the defendant had failed to make a post-judgment motion for JNOV, the reviewing court could remand for a new trial but could not reverse the judgment. The views expressed in those cases were not, however, included in the current Rule 50, when it was completely rewritten and adopted by this Court in 1963.

claim, in the amount of $4,000,000, plus interest. The antitrust claim should be dismissed.

Respectfully submitted,

ROBERT A. SCHROEDER
Counsel of Record

LEIGH OTSUKA LINDER
BINGHAM MCCUTCHEN LLP
355 South Grand Avenue,
Suite 4400
Los Angeles, California 90071
(213) 680-6400

JOHN P. PASSARELLI
DAVID H. ROE
MCGRATH NORTH MULLIN & KRATZ
3700 First National Tower
1601 Dodge Street
Omaha, Nebraska 68102
(402) 341-3070
Attorneys for Cross-Petitioner

(2)

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IN THE

Supreme Court of the United States

SWIFT-ECKRICH, INC. d/b/a
CONAGRA REFRIGERATED FOODS,

Cross-Petitioner,

v.

UNITHERM FOOD SYSTEMS, INC.,

Cross-Respondent.

ON CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF IN OPPOSITION

BURCK BAILEY
Counsel of Record
GREG A. CASTRO
JAY P. WALTERS
FELLERS, SNIDER,
BLANKENSHIP,
BAILEY & TIPPENS
100 North Broadway
Suite 1700
Oklahoma City, OK 73102-8820
(405) 232-0621

DENNIS D. BROWN
FELLERS, SNIDER,
BLANKENSHIP,
BAILEY & TIPPENS
321 South Boston
Suite 800
Tulsa, OK 74103-3318
(918) 599-0621

Attorneys for Cross-Respondent

192151

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

RULE 29.6 STATEMENT

Cross-Respondent has no parent and there are no publicly held companies that hold any stock of the Respondent. Although not a Respondent herein, Jennie-O Foods, Inc., (now known as Jennie-O Turkey Store, Inc.) is a wholly owned subsidiary of Hormel Foods Corporation.

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1. CONAGRA'S PURPORTED CONDITIONAL CROSS-PETITION DOES NOT COMPLY WITH SUPREME COURT RULE 10.

ConAgra does not state, or even suggest, that there are "compelling reasons" to grant its Conditional Cross-Petition for a Writ of Certiorari.[1] Instead, ConAgra quarrels with the Federal Circuit's factual determinations and its references to the allegations in the pleadings. This is not the stuff of a petition for a writ of certiorari.

In Number 3 of its "Questions Presented", ConAgra appears to argue the merits of the question presented in Unitherm's Petition for Writ of Certiorari, to which ConAgra chose not to respond. What remains is the unequivocal fact that ConAgra did not make a post-verdict motion for JMOL to preserve sufficiency of the evidence for appellate review.[2] This is the question that cries out for resolution by this Court. Indeed, ConAgra apparently concedes the need to clarify this issue for the federal courts.[3]

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1. SUP. CT. R. 10 provides, in pertinent part: "A petition for writ of certiorari will be granted only for compelling reasons. * * *"

2. In its Conditional Cross-Petition (p. 3), ConAgra states: "ConAgra did not renew its motion to dismiss [sic] in a post-verdict motion for JMOL under Rule 50(b)."

3. ConAgra states: "It is time to revisit the question and hold that motions under the current Rule 50(b) are permissive and are not necessary to preserve rights of any kind on appeal." (Conditional Cross-Petition, p. 18).

2. THERE IS NO ISSUE AS TO UNITHERM'S STANDING TO SUE.

ConArga's antitrust standing argument is pure sophistry. ConAgra erroneously conflates issues and case citations relating to Constitutional Article III standing with statutory antitrust standing.[4] Section 4 of the Clayton Act provides a private remedy to "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws .. ."[5] Despite the unlimited scope of Section 4, courts have denied authority to sue to plaintiffs whose injury is merely derivative or remote. For example, shareholders of a corporation that has been injured by an antitrust violation have been denied standing to sue,[6] as have creditors or lessors of an injured entity.[7] It is a non-issue here. Unitherm fits precisely within the holding of *Walker*

---

4. Contrary to ConAgra's suggestions, antitrust standing is not a jurisdictional issue and case law relating to "injury-in-fact" Article III standing is inapposite. *See Hammes v. AAMCO Transmissions, Inc.*, 33 F.3d 774, 778 (7th Cir. 1994) (Posner, J.). These concepts are legally and analytically distinct. *See New York v. Microsoft Corp.*, 209 F. Supp. 2d 132, 141-42 (D.D.C. 2002).

5. In *Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co.*, 334 U.S. 219, 236 (1948), this Court stated that the Sherman Act "does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers . . . the Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated."

6. *Sports Racing Servs. v. Sports Car Club of America*, 131 F.3d 874, 881 (10th Cir. 1997).

7. *Calderone Enter. Corp. v. United Artists Theatre Circuit, Inc.*, 454 F.2d 1292, 1295 (2d Cir. 1971).

Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172 (1965). Unitherm lost sales of its browning process because of ConAgra's enforcement of its fraudulently obtained patent on the identical process. Other suppliers of food browning systems were also unable to sell their products after ConAgra blanketed the industry with its threatening letters announcing its intention to aggressively enforce its patent on the browning process. (A 5140). The Federal Circuit noted that "ConAgra moved [by summary judgment] to have Unitherm's claim dismissed for lack of antitrust standing and Jennie-O's claim dismissed for lack of cognizable antitrust injury." (App. A p. 9a).[8] The point urged by ConAgra in the district court with reference to Unitherm was that ConAgra and Unitherm were not competitors, therefore Unitherm had no standing to complain. The district court ruled on the issue precisely, as noted by the Federal Circuit:

> The district court then ruled that Unitherm, but not Jennie-O, had antitrust standing because first, as ConAgra's direct competitor for sales of browning/smoking processes, Unitherm was susceptible to the types of injuries that the antitrust laws are supposed to prevent, and second, ConAgra's threats to enforce its patent could cause those injuries.

(App. A p. 9a).

---

8. Jennie-O Foods Inc. (now known as Jennie-O Turkey Store, Inc.) is a vendor of turkey products to the trade. Jennie-O's only interest was in having ConAgra's patent invalidated on the grounds of prior sales and prior uses of the patented process. Jennie-O had incurred no damages.

The Federal Circuit treated standing as an issue to be determined as a matter of law, and antitrust injury as an "intensely factual" determination.[9] The issue of Unitherm's standing to sue, raised by ConAgra in its Motion for Summary Judgment and never at trial, resulted in the Federal Circuit reviewing the district court's summary judgment analysis on Unitherm's allegations, and holding:

> The district court was therefore correct in ruling that Unitherm had antitrust standing in allowing its action against ConAgra to proceed.

(App. A p. 44a).

---

9. ConAgra's contention that courts cannot determine antitrust standing from the nature of the allegations contradicts the very authority it cites. *See Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 111 (1986) ("[T]he lower courts, including the courts below, have found that under both § 16 and § 4 the plaintiff must still *allege* an injury of the type the antitrust laws were designed to prevent. We agree." (emphasis supplied)); *Associated General Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 521, 545-46 (1983)

> The question presented is whether the complaint sufficiently alleges that the unions have been 'injured in [their] business or property by reason of anything forbidden in the antitrust laws' and may therefore recover treble damages under § 4 of the Clayton Act*** Accordingly, we hold that, based on the allegations of the complaint, the District Court was correct . . .

See also Blue Shield of Va. v. McCready, 457 U.S. 465, 471 (1982) (affirming the Fourth Circuit's holding that plaintiff's complaint "had alleged an injury within the meaning of § 4 of the Clayton Act and had standing to maintain the suit").

In its review of the sufficiency of the evidence, the Federal Circuit concluded that Unitherm's proof of antitrust *injury* was insufficient:

> The Tenth Circuit recognizes antitrust standing, like all questions of standing to sue, as a question of law subject to *de novo* review. [Citing cases.] *Market definition and antitrust injury, on the other hand, are intensely factual determinations. See, e.g., Eastland Kodak Co. v. Image Technical Servs.*, 504 U.S. 451, 482 (1992) ... We must therefore review the evidence supporting the jury's necessary findings of a relevant antitrust market and of antitrust injury.

(App. A at 13a, 14a) (emphasis supplied).

With reference to injury, the Federal Circuit noted that the trial court instructed the jury as follows:

> Jury Instruction No. 14 defined antitrust injury:
>
> Plaintiff must establish that it was injured as a result of defendant's alleged attempt to gain a monopoly ... to establish injury, plaintiff must prove that some damage flowed to Unitherm as a result of defendant's alleged attempt to gain a monopoly ... it is enough that plaintiff proves that the alleged attempt to gain a monopoly was a material cause of its injury.

(App. A at p. 10a).

ConAgra did not object to the instruction. The jury, thus instructed, found the facts under the evidence in favor of Unitherm. Without ever challenging the sufficiency of the evidence in the trial court at any time, ConAgra raised the point for the first time on appeal. The Federal Circuit determined there was insufficient evidence of causality and improperly sat in the jury box and reversed the verdict.

As discussed *infra*, ConAgra *never* brought these issues before the district court on a motion for judgment as a matter of law. Unitherm argued strenuously in the Federal Circuit that it was improper and unfair for the appellate court to review sufficiency of the evidence. ConAgra had not preserved these issues (or other elements of Unitherm's antitrust claim) for appellate review. Nevertheless, applying the minority view of the Tenth Circuit, the Federal Circuit proceeded to review sufficiency of the evidence (to Unitherm's detriment), in the absence of any Rule 50 motion by ConAgra.

3. THE *BRUNSWICK* AND *CARGILL* CASES HAVE NO APPLICATION TO THE ISSUES AT HAND.

ConAgra cites to *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1976), and to *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104 (1986), for the proposition that Rule 50 has no application to a review of jurisdiction based on standing to sue. As pointed out above, this is a smoke-screen. No such issue exists in this case. *Brunswick* was a merger case brought pursuant to Section 7 of the Clayton Act. Brunswick was a large bowling equipment manufacturer. When certain bowling alley centers defaulted on paying Brunswick for equipment, Brunswick acquired them so the centers could continue in operation. The plaintiffs were bowling alley centers that competed with the failing

bowling centers acquired by Brunswick. The plaintiffs alleged as damages the profits they would have made had the acquired centers been closed. In short, plaintiffs were aggrieved because they continued to face competition. This Court stated:

> Petitioner questions only whether antitrust damages are available where the sole injury alleged is that competitors were continued in business, thereby denying respondents an anticipated increase in market shares.

Id. at 709.

This Court simply asserted the well-settled rule that the antitrust laws condemn anti-competitive effects, not *pro-competitive* effects. The plaintiffs did not allege the kind of injury the antitrust laws were designed to prevent. "[I]t follows that, petitioner is entitled, *in accord with its motion made pursuant to Rule 50(b)*, to judgment on the damages claim notwithstanding the verdict." *Id.* at 713 (emphasis supplied). By contrast, ConAgra's enforcement of its fraudulent patent destroyed competition in the market for browning processes - an injury directly caused by ConAgra's antitrust violation. Moreover, unlike Brunswick, ConAgra never raised the issue in a Rule 50(b) motion.

The plaintiff in *Cargill* sought an injunction under Section 16 of the Clayton Act, to enjoin a merger that would increase, not reduce, competition. As in *Brunswick*, this Court observed that "a showing of loss or damage due merely to increased competition does not constitute [antitrust] injury." *Cargill*, 479 U.S. at 122. There has never been any contention that ConAgra's enforcement of its bogus patent *increased*

competition. *Brunswick* and *Cargill* are utterly beside the point urged by Unitherm.[10]

4. A MOTION UNDER RULE 50(b) IS REQUIRED TO PRESERVE SUFFICIENCY OF THE EVIDENCE FOR APPELLATE REVIEW OF A JUDGMENT ON A JURY VERDICT.

ConAgra contends that a Rule 50(b) motion is not required "to preserve the full range of rights on appeal when a pre-verdict motion is made under Rule 50(a)." (Conditional Cross-Petition, p. 14). ConAgra cites no authority for this proposition. Indeed, ConAgra's argument violates Supreme Court Rule 15.2 as it is an untimely response to Unitherm's Petition for a Writ of Certiorari.

Again, ConAgra is not forthcoming in its description of the issue. The issue upon which the Federal Circuit reversed the jury's verdict on Unitherm's antitrust claim was the sufficiency of the evidence. As to *this* issue, eight of the federal circuits squarely hold that a Rule 50(b) motion is mandatory for appellate review. "It is thoroughly established that the sufficiency of the evidence is not reviewable on appeal unless a motion for judgment as a matter of law was made in the trial court." 9A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2536 (2d ed.

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10. ConAgra states that there was no "post-trial motion" in *Cargill*. (Conditional Cross-Petition, p. 12). Unitherm can find no indication in this Court's opinion in *Cargill* whether there was or was not a post-trial motion. But it is a non-sequitur in any event because Rule 50 only applies to sufficiency of the evidence issues in *jury trials*. Rule 50(a) provides in pertinent part: "If during *a trial by jury* a party has been fully heard on an issue and there is no legally *sufficient evidentiary basis* . . ." *Cargill* was a bench trial.

1994). Of course, errors at the trial, duly objected to, dealing with matters other than sufficiency of the evidence may be raised on appeal without the necessity of a Rule 50 motion in the trial court. *Ruyle v. Continental Oil Co.*, 44 F.3d 837, 841 (10th Cir. 1994) (a Rule 50 motion deals only with sufficiency of the evidence, rather than questions of law generally).

Furthermore, Unitherm pointed out in its Petition for a Writ of Certiorari (footnote 4, pp. 6-7) that ConAgra did *not* make a Rule 50(a) motion contesting the sufficiency of the evidence on the elements of Unitherm's antitrust claim. ConAgra seriously misstates the record when it states that it made such a motion. (Conditional Cross-Petition, p. 15).[11] The *only* statement ConAgra's counsel made that even arguably made reference to Unitherm's antitrust claim was to express his doubt about the sufficiency of the evidence to prove an intent to deceive the patent office:[12]

> Well, now the plaintiff is now in, or plaintiff's case is now in, and I realize that intent can be inferred but it has to be inferred from something and I don't believe there's evidence here that would permit that inference.

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11. ConAgra states: "In this case, ConAgra did move, under Rule 50(a), for dismissal of the antitrust claim at the close of the evidence and was not required to make that motion again under Rule 50(b) to preserve its right to appeal." Not so.

12. Proof that ConAgra obtained its patent by committing fraud on the patent office was an element of Unitherm's *Walker Process* claim under Section 2 of the Sherman Antitrust Act, and also an element of Unitherm's claim of tortious interference under Oklahoma common law.

(A 5237).[13] That is the sum total of ConAgra's "motion for directed verdict" arguably on Unitherm's antitrust claim made at the conclusion of Unitherm's case in chief.[14] The Tenth Circuit law set forth in *Cummings v. General Motors Corp.*, 365 F.3d 944 (10th Cir. 2004), holds that the moving party must include all issues challenged and must *specify* the basis for its motion:

> The motion must include *all issues challenged*, as the 'failure to move for directed verdict [now judgment as a matter of law] *on a particular issue will bar appellate review of that issue.*
>
> * * *
>
> In this case, the Cummings moved for judgment as a matter of law with regard to the defense of misuse only and requested a jury instruction on this issue. Counsel did not move for judgment as a matter of law with regard to GM's liability generally . . . Although technical precision is not required, *the moving party must adequately notify the court of*

13. Even as to fraudulent intent the comment by ConAgra's counsel was clearly not a specification of "the law and the facts on which the moving party is entitled to judgment" as required by Rule 50(a).

14. ConAgra also seriously misstates the record when it impugns the trial judge by saying she "several times expressed her desire not to hear further about ConAgra's position on the deficiencies of the antitrust claim." (Conditional Cross-Petition, p. 16). On the contrary, the trial judge allowed ConAgra's counsel to make a lengthy argument for directed verdict, but ConAgra's counsel directed his argument only to Unitherm's claims under Oklahoma common law. (A5232-5237). ConAgra's counsel never mentioned the word "antitrust" in his argument, and the only statement he made that could even arguably apply to Unitherm's antitrust claim was the one quoted above.

> *the issues being raised in order to satisfy the purposes of the Rule. The plaintiffs' motion was limited to a motion for judgment as a matter of law on the issue of misuse and therefore any appeal is so limited.*

365 F.3d at 949-50 (emphasis supplied).

ConAgra's complaints about sufficiency of the evidence on the issues of relevant market and antitrust injury were raised for the first time on appeal. ConAgra did not alert Unitherm or Judge Cauthron to these purported deficiencies at the time Unitherm had an opportunity to rectify them. ConAgra's failure to comply with Rule 50 perpetrated unfairness on Unitherm and on the trial court.

While ConAgra failed to make a proper Rule 50(a) motion regarding Unitherm's antitrust claim, Unitherm's Petition for a Writ of Certiorari is directed to ConAgra's *admitted* failure to make a Rule 50(b) motion to preserve sufficiency of the evidence for appellate review. This is the issue that clearly divides the federal circuits and that flies in the face of this Court's strong *dicta* in the *Cone*, *Johnson*, *Neely* and *Weisgram* cases cited by Unitherm in its Petition for a Writ of Certiorari.

ConAgra argues that Rule 50(b) is merely "permissive" because it provides that a party "may" renew its motion no later than ten days after entry of judgment. (Conditional Cross-Petition, p. 14). Of course, no one can *force* the loser of a jury verdict to renew a motion for judgment as a matter of law after entry of judgment. *See* 9 JAMES WM. MOORE, ET AL., MOORE'S FEDERAL PRACTICE, § 50.41 (3d ed. 2004). As noted above, if the loser is appealing on grounds other than the sufficiency of the evidence, such motion is not required. But it is a prerequisite

for appellate review of sufficiency of the evidence in eight federal circuits, and should be a prerequisite as a matter of federal jurisprudence nationally. As the Tenth Circuit noted in *Cummings*, ". . . the vast majority of other circuits have held that the failure to renew a motion for judgment as a matter of law following a jury verdict precludes an appellate court from reviewing sufficiency of the evidence." 365 F.3d at 950 n.1. In its Petition for a Writ of Certiorari, Unitherm cited *Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212 (1947), and *Johnson v. New York, New Haven and Hartford R.R. Co.*, 344 U.S. 48 (1952), for the proposition that Rule 50 requires a post-verdict motion for JMOL to preserve sufficiency of the evidence for appellate review. ConAgra states that these "older cases on which Unitherm relies held that a renewal of a pre-verdict motion was not required to preserve the right to a re-trial, only to preserve the right to a reversal." (Conditional Cross-Petition, p. 18). *Cone* and *Johnson* hold no such thing. In both cases, the losing party had moved for directed verdict and moved post-verdict for a new trial or to set aside the jury verdict. The courts of appeals had found the Plaintiff's evidence insufficient and directed judgment be entered for Defendant. This Court held that the appellate court could not direct entry of a judgment for defendant in the absence of a post-verdict motion for j.n.o.v. There was no ruling whatsoever of the kind described by ConAgra. Unlike a motion for judgment as a matter of law, which can be made "during a trial" when a party has been "fully heard", a motion for new trial can, by definition, only be made "after entry of the judgment." *See* FED R. CIV. P. 59(b).[15]

Furthermore, ConAgra's statement in its footnote 11 (Conditional Cross-Petition, p. 18) that, "The views expressed

15. Sufficiency of the evidence challenges are properly raised by motion for JMOL, while other rulings on evidence may be assigned as grounds for a new trial. *Weisgram*, 528 U.S. at 453 n.9.

in those cases were not, however, included in the current Rule 50, when it was completely rewritten and adopted by this Court in 1963", is similarly baffling. In *Neely v. Martin K. Eby Constr. Co.*, 386 U.S. 317 (1967), this Court stated:

> As the Advisory Committee explained, these 1963 amendments were not intended to 'alter the effects of a jury verdict or the scope of appellate review,' *as articulated in the prior decisions of this Court*.

Id. at 324 (emphasis supplied).

After citing to *Cone*, *Johnson*, and *Globe Liquor Co. v. San Roman*, 332 U.S. 571 (1948), this Court stated:

> The opinions in the above cases make it clear that an appellate court may not order judgment n.o.v. where the verdict loser has failed strictly to comply with the procedural requirements of Rule 50(b), or where the record reveals a new trial issue which has not been resolved.

386 U.S. at 325.

This Court's emphasis on the necessity for *strict compliance* "with the procedural requirements of Rule 50(b)" can only lead, Unitherm submits, to the conclusion that failure to make a Rule 50(b) motion precludes an appellate court from reviewing sufficiency of the evidence. *See also Weisgram*, 528 U.S. at 549. Nothing about the 1963 amendments to Rule 50 had any effect on the holdings of this Court in the cases cited by Unitherm.

CONCLUSION

The foregoing considered, ConAgra's Conditional Cross-Petition for a Writ of Certiorari should be denied and Unitherm's Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

BURCK BAILEY
Counsel of Record
GREG A. CASTRO
JAY P. WALTERS
FELLERS, SNIDER,
BLANKENSHIP,
BAILEY & TIPPENS
100 North Broadway
Suite 1700
Oklahoma City, OK 73102-8820
(405) 232-0621

DENNIS D. BROWN
FELLERS, SNIDER,
BLANKENSHIP,
BAILEY & TIPPENS
321 South Boston
Suite 800
Tulsa, OK 74103-3318
(918) 599-0621

Attorneys for Cross-Respondent

(3)

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In The
Supreme Court of the United States

SWIFT-ECKRICH, INC., DOING BUSINESS AS CONAGRA REFRIGERATED FOODS,

Cross-Petitioner,

v.

UNITHERM FOOD SYSTEMS, INC.,

Cross-Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

BRIEF IN REPLY TO OPPOSITION

ROBERT A. SCHROEDER
Counsel of Record
LEIGH OTSUKA LINDER
BINGHAM MCCUTCHEN LLP
355 South Grand Avenue,
Suite 4400
Los Angeles, California 90071
(213) 680-6400

JOHN P. PASSARELLI
DAVID H. ROE
MCGRATH NORTH MULLIN
& KRATZ PC LLO
3700 First National Tower
1601 Dodge Street
Omaha, Nebraska 68102
(402) 341-3070

Attorneys for Cross-Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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1. UNITHERM HAS NO ANTITRUST STANDING.

The antitrust claims should have been dismissed once the Federal Circuit Court of Appeals concluded that Unitherm Food Systems, Inc. ("Unitherm") had "failed to present any facts that could allow a reasonable jury to accept . . . its demonstration of antitrust injury." (App. A, 44a.) Proof of antitrust injury was needed not only to persuade the jury of injury to Unitherm – the proof was also needed to demonstrate ***to the court*** that there was antitrust ***standing*** so as to permit the case to go to the jury. Without standing there was no jurisdiction, and without jurisdiction the jury verdict had no meaning. *Steel Co. v. Citizens for a Better Env.*, 523 U.S. 83, 101 (1998).

Unitherm's statement at the opening page of its Opposition that "ConAgra quarrels with the Federal Circuit's factual determinations" is very wrong. ConAgra's Cross-Petition is based on the failure of the Federal Circuit to follow through and apply the law to its determination that Unitherm did not prove standing. Unitherm unequivocally agrees that the Federal Circuit found the failure to prove antitrust injury: "In its review of the sufficiency of the evidence, the Federal Circuit concluded that Unitherm's proof of antitrust *injury* was insufficient." (Opp., p. 5, emphasis in original.)

With little regard for the need to prove antitrust standing, Unitherm argues without authority that section 4 of the Sherman Act has "unlimited scope," and it concedes only that limited classes of persons lack standing (e.g., "creditors and lessors of the injured entity"). (Opp., p. 2.) However, the universe of parties who have standing is far more limited than Unitherm asserts because "the antitrust laws . . . were intended for the protection of

competition, not competitors." *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 110 (1986), (emphasis in original) quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1976).

Given the most fundamental, undisputable facts of this case, it was inevitable that Unitherm would fail to demonstrate standing: it sells food processing equipment, while ConAgra sells food.[1] Indeed, the only argument that Unitherm can muster in favor of standing was based on the supposed existence of a market for browning processes. Unitherm's own expert witness, however, conceded that neither Unitherm nor anyone else has ever "sold" such a process, which led the Federal Circuit to conclude that the evidence "could not sustain the narrow market . . . that Unitherm pleads as a relevant antitrust market." (App. A, 48a.)

Unitherm asserts that its antitrust injury was its own "lost sales," bolstered by sales supposedly lost by other equipment manufacturers which, like Unitherm, were ***not*** ConAgra competitors. Yet Unitherm ignores completely the fact that it was compensated for this non-antitrust injury under Oklahoma tort law. The jury measured Unitherm's damages as $2,000,000, which were doubled under Oklahoma law, and Unitherm was awarded $4,000,000 on that basis. ConAgra does not challenge this award. This is not a case of an injured party that is not

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[1] Unitherm argues that it must have standing because it "fits precisely within the holding [Unitherm does not say *what* holding] of *Walker Process Equip., Inc. v. Food Mach. and Chem. Corp.*, 382 U.S. 172 (1965)." That case, however, provides little assistance to Unitherm, as the *Walker Process* parties were competitors in the sale of food processing equipment, and the issue of standing was never raised.

compensated. Unitherm is a party that has been doubly compensated, but wants more based on a bogus and unsupportable antitrust claim.

The precise error of law that caused this case to be remanded was the Federal Circuit's determination of standing based on the ***allegations of the pleadings*** rather than the ***evidence***. (App. A, 44a.) In effect, the Federal Circuit held that Unitherm could (and did) establish standing by merely alleging it. Its conclusion was tantamount to finding that jurisdiction exists because it is alleged, even though the evidence is to the contrary.

In its efforts to overcome (or obfuscate) the error by the Federal Circuit, Unitherm misconstrues this Court's earlier precedents. (Opp., p. 4, n.9.) *Cargill*, 479 U.S. at 111; *Associated Gen. Contractors of Cal., Inc. v. California State Council of Carpenters*, 459 U.S. 519, 521, 545-46 (1983). These cases do not suggest that allegations alone can establish standing where proof to support the allegations is lacking. They merely confirm that proper allegations of standing are needed to prevent a ***dismissal before the plaintiff has presented its evidence***. They do not hold that a party can continue to rely on mere allegations of standing after it has tried and failed to prove standing.[2]

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[2] The District Court's denial of ConAgra's motion for summary judgment based on lack of standing did not, as Unitherm suggests (Opp., p. 3), relieve it from having to ***prove*** standing by competent evidence. Even if we were to assume for the sake of argument that the Federal Circuit had not found against Unitherm based on its review of the evidence, denial of summary judgment certainly did not amount to a determination that Unitherm did, in fact, have standing.

In *Cargill,* reversing the lower courts' denial of dismissal for lack of standing, this Court pointed to the absence of *evidence* in the record, rather than relying on allegations in the pleadings. It rejected, for example, the plaintiff's assertion that "evidence in the record" supported a theory of predatory pricing. "This evidence . . . consists only of four passing references, three in deposition testimony, to the possibility that Excel's prices might dip below costs." *Id.* at 119. In *Associated Contractors,* a different posture altogether was presented. Dismissal was sought based on the pleadings ***before*** any evidence was in. Under those circumstances, the Court looked to the adequacy of the pleadings.

Of course, sufficient allegations alone cannot ensure that a plaintiff will survive a standing challenge because, in the end, the allegations must be followed by ***proof***. In other words, allegations are necessary but not sufficient. The Federal Circuit's reliance on allegations alone deprives the standing requirement of any real meaning. All a party needs to do, according to the Federal Circuit, is allege standing without regard to the evidence or the facts. Unitherm cites no precedent, and we know of none, in which a party was ultimately allowed to rely on mere allegations to satisfy the standing requirement after the evidence had been presented.

Unitherm is wrong when it argues that ConAgra's Cross-Petition does not present a proper and important issue for review by this Court. (Opp., p. 1.) If the Federal Circuit decision is allowed to stand, it will be a clear precedent for determining antitrust standing based on the pleadings alone, without regard for the evidence.

2. RULE 50(B) DOES NOT APPLY AND SHOULD NOT BE INTERPRETED TO REQUIRE A REDUNDANT POST-JUDGMENT MOTION TO PRESERVE REVIEW.

The threshold ***procedural*** question[3] presented by this Cross-Petition is not the interpretation of Fed.R.Civ.P. 50, but whether the rule applies here at all. Rule 50 does not apply to determinations of standing, which are not jury determinations. If Rule 50 were intended to apply here, it would not begin with the words "If during a trial by jury. . . . " Unitherm does not address at all the question of whether Rule 50 has any application to a determination of antitrust standing, so apparently it agrees that the rule does not apply.

However, even if the Court were to agree that antitrust standing presents a question that is subject to Rule 50, the Court nevertheless should rule that a redundant post-judgment motion[4] is not a prerequisite to appellate

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[3] Unitherm has completely lost sight of the fact that the error here arose out of a *procedural* question. (Opp., pp. 6-8.) This is apparent in its discussion of the facts underlying the *merits* of the *Brunswick* and *Cargill* cases, e.g., that *Brunswick* involved bowling centers, not turkeys.

[4] Notwithstanding Unitherm's assertion, further review of ConAgra's *pre-verdict* Rule 50(a) motion is inappropriate because that motion was not made part of the questions presented in the Petition or the Cross-Petition. The Federal Circuit was satisfied that ConAgra had adequately preserved review of antitrust injury and standing, and its ruling on this issue thus ends the matter. (App. A, 42a ["ConAgra challenges on appeal, ***as it did below***, Unitherm's standing to bring its antitrust claim"].) Unitherm's selective citations to the appellate record paints a distorted picture, at best. Unitherm does not mention, for example, that ConAgra had filed pre-trial briefing on antitrust injury and standing, and that Judge Cauthron, in ruling on ConAgra's Rule

(Continued on following page)

review. Fed.R.Civ.P. 50(b) does not contain any suggestion that error is waived by failure to make the duplicate motion that it permits. It is a fair and reasonable assumption that if this rule were intended to call for the forfeiture of a substantial right because a litigant did not make its motion a second time, it would explicitly so state.

Other rules governing trial and appellate proceedings provide us with examples of such forfeiture language. For example, Fed.R.Evid. 103(a) describes the procedure for preserving an error ***and the consequence of the failure to abide by the procedure***:

> ***Error may not be predicated*** upon a ruling which admits or excludes evidence . . . unless a substantial right of the party is affected, and (1) . . . [i]n case the ruling is one admitting evidence, ***a timely objection or motion to strike appears of record***, stating the specific ground of objection, if the specific ground was not apparent from the context. . . .

(Emphasis added.) Similarly, Fed.R.App.P. 3(a)(1) states the mandatory procedure for taking appeal:

> An appeal permitted by law as of right from a district court to a court of appeals may be taken ***only by filing a notice of appeal*** with the district clerk within the time allowed by Rule 4. At the time of filing, the appellant ***must*** furnish the clerk with enough copies of the notice to enable the clerk to comply with Rule 3(d).

50(a) motion, acknowledged that she understood ConAgra's position and was not inclined to allow counsel to argue the point again.

Rule 50(b) stands in stark contrast. Even after numerous revisions, that rule does not mention "error," "appeal," or "review." It does not say that a post-judgment motion is the "only" means of preserving error, or that a motion "must" be made at peril of forfeiting appellate review. Unitherm argues that there must be "strict compliance 'with the procedural requirements of Rule 50(b),'" but all that the rule does is set forth a time limit for making post-verdict motions. The only forfeiture that can be inferred is the forfeiture of the right to make a post-trial motion, not the right to appellate review of a motion previously made under Rule 50(a).

This Court, in *Cone, Johnson,* and *Globe Liquor*,[5] held that a post-verdict renewal of a ***pre-verdict*** challenge was a prerequisite to an appellate court's power to direct a verdict based on insufficient evidence. Unitherm now urges the Court to go a step further and hold that in the absence of a ***post-verdict*** motion, the appellate court may not even remand for a new trial. Neither of these unstated requirements would serve the interests of judicial economy or fairness.

This Court noted in *Cone* that a post-judgment motion gives the trial judge a "last chance" to exercise his or her discretion to choose whether to direct a verdict or order a new trial.

> Determination of whether a new trial should be granted or a judgment entered under Rule 50(b) calls for the judgment in the first instance of the

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[5] *Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212 (1947); *Johnson v. New York, N.H. & H.R. Co.*, 344 U.S. 48 (1952); *Globe Liquor Co. v. San Roman*, 332 U.S. 571 (1948).

> judge who saw and heard the witnesses and has the feel of the case which no appellate printed transcript can impart. [Citations.] Exercise of this discretion presents to the trial judge an opportunity, after all his rulings have been made and all the evidence has been evaluated, to view the proceedings in a perspective peculiarly available to him alone. He is thus afforded "a last chance to correct his own errors without the delay, expense or other hardships of an appeal." [Citations.]

Id. at 216.

However, exactly the same can be said for the trial court's review of a Rule 50(a) pre-verdict motion. There is no benefit to having the same trial judge rule on the same motion twice, and there is, therefore, no reason to require a second motion.

Unitherm does not even attempt to explain why it should be necessary for a litigant to avail itself of *Cone's* "last chance" in *every* case. Tellingly, it does not explain why this particular case would have been better positioned for appeal had ConAgra renewed post-judgment its challenge to antitrust injury and standing. Well before Judge Cauthron ever "saw and heard the witnesses" at trial, she had already ruled on Unitherm's antitrust standing in the context of a summary judgment motion, and she had already read and considered ConAgra's pre-trial briefing of the issue. Nothing happened at the trial that changed the standing issue. She made very clear that she understood ConAgra's position and did not want to have more argument on the point. Renewal of the motion post-judgment would have been a futile act that only would have delayed the appeal and increased legal fees. Any decision to call for

and consider written briefs after the evidence has been presented, whether the post-evidence motion is made once under Rule 50(a) or twice under Rules 50(a) and 50(b), falls squarely within the sound discretion of trial judges to properly and expeditiously manage the cases before them.

Revisitation of the Court's earlier precedents is warranted, given the absence of explicit guidance in Rule 50(b) itself and the unwarranted forfeiture of rights that, in some circuits, results from a failure to comply with purely procedural "requirements" that do not appear in the rule. ConAgra submits that trial judges should not be forced, by imagined requirements that cannot be found in the rule, to hear redundant motions that are not helpful, and are instead made formalistically to preserve rights on appeal. This Court should clarify that Rule 50(b) does not require a post-judgment renewal of a pre-verdict motion under Rule 50(a) to preserve error based on sufficiency of the evidence, and in the absence of such second motion, an appellate court may direct verdict or remand for new trial where sufficient evidence is lacking.

Respectfully submitted,

ROBERT A. SCHROEDER
Counsel of Record
LEIGH OTSUKA LINDER
BINGHAM MCCUTCHEN LLP
355 South Grand Avenue,
Suite 4400
Los Angeles, California 90071
(213) 680-6400

JOHN P. PASSARELLI
DAVID H. ROE
MCGRATH NORTH MULLIN
& KRATZ PC LLO
3700 First National Tower
1601 Dodge Street
Omaha, Nebraska 68102
(402) 341-3070

Attorneys for Cross-Petitioner